

D.P.U. 93-DS-43

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by Thomas Hart.

APPEARANCES: Thomas Hart
19 Bullard Street
Dedham, Massachusetts 02061

Respondent

Gail Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202

FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On January 5, 1994, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Thomas Hart ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on November 11, 1993, at 19 Bullard Street, Dedham, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to tender proper notification and failed to exercise reasonable precaution, causing damage to an underground service line operated by Commonwealth Gas Company ("Commonwealth Gas" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer at an informal conference on January 19, 1994 or send a written reply to the Department by that date.

On January 19, 1994, pursuant to 220 C.M.R. § 99.06 (1), the Respondent appeared at an informal conference. In a letter dated February 3, 1994, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. On February 8, 1994, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on May 31, 1994 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

At the hearing, Gail Soares, a Dig-Safe investigator, appeared on behalf of the Division. Paul Pouliot, senior engineer for Commonwealth Gas, and Steve Richmond, distribution supervisor for Commonwealth Gas, testified on behalf of the Division. The Division presented

five exhibits. Thomas Hart testified on his own behalf. The Respondent presented one exhibit. All exhibits were moved into evidence.

II. SUMMARY OF FACTS

A. The Division

The Division alleged that the Respondent failed to tender proper notification thus failing to exercise reasonable precaution while hand-digging a trench for an electrical line at 19 Bullard Street in Dedham, Massachusetts, which resulted in damage to a 1-inch plastic low-pressure gas line operated by Commonwealth Gas (Tr. at 7; Exh. D-1). In support of this allegation, Mr. Pouliot testified that the Respondent did not have a Dig-Safe number (Tr. at 7-8).¹ Mr. Pouliot also offered an underground damage report which indicated that there was no Dig-Safe number (Exh. D-1).

B. The Respondent

Mr. Hart testified that he damaged a one inch underground gas line operated by Commonwealth Gas while digging a trench for a low-voltage power line (Tr. at 25). Mr. Hart also stated that he knew the location of the underground service, although he did not have a Dig-Safe number and there were no markings present (id.). The Respondent further testified that the underground service line did not appear to be 12 inches deep (id. at 28). Finally, the Respondent testified that if the underground service was deeper in the ground, the damage would not have occurred (id.).

¹ Dig Safe Systems, Inc. is a non-profit organization which can be contacted by an excavator to properly notify all utilities that have underground facilities in the area of an excavation.

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

No person shall, except in an emergency...make an excavation...which shall not be deemed to include gardening or tilling the soil in the case of privately owned land...unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but no more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such public utility companies...as supply service...to the city or town where such excavation is to be made.

The statute is clear and unambiguous. Any company, contractor or person must properly notify the appropriate operators of underground utilities at least 72 hours before beginning an excavation. Industrial Contractors and Developers, D.P.U. 86-DS-25 (1988); John Farmer, D.P.U. 86-DS-102 (1987).

The Department's regulation at 220 C.M.R. 99.02 define excavation as:

...the movement or removal of earth, rock, ledge or other materials in the ground to form a cavity, hole, hollow or passage therein. It shall include, but not be limited to digging; trenching; grading; scooping; tunnelling; auguring;...[or the] demolition of any structure... Excavation shall not mean gardening or tilling the soil in the case of privately owned land.

IV. ANALYSIS AND FINDINGS

The issue to be determined in this case is whether the activities which damaged the Company's pipeline conformed to the definition of "excavation", thereby requiring proper notification pursuant to the Dig-Safe Law.

The Respondent testified that he dug a trench to install a low voltage power line. The Respondent also testified that he did not contact Dig-Safe Inc. or any utility company with underground facilities in the area before digging the trench to install the low-voltage power line.

The Dig-Safe Law does not provide a definition of excavation but does provide that an

excavation shall not be deemed to include gardening or tilling the soil in the case of privately owned land. The Definition of excavation as set forth in 220 C.M.R. § 99.02, includes the removal of earth...or other materials in the ground to form a cavity...or passage, and includes the act of digging. Accordingly based on the above the Department finds that the digging of a trench to install a power line constitutes excavation under the Dig-Safe Law. The Respondent contended that the pipe was at an improper depth. However, a variation in depth does not relieve an excavator of his responsibility to tender proper notification as required by the Dig-Safe Law before excavation.

Accordingly, the Department finds that the Respondent failed to tender proper notification prior to excavation at 19 Bullard Street in Dedham, Massachusetts, and therefore violated the Dig-Safe Law.²

² The Dig-Safe Law applies to persons performing excavations on private property. When an excavation is started by individuals on private property where underground utilities may be located, those individuals must be cognizant of the possible existence of those facilities, and (or) contact Dig-Safe System, Inc. or companies with underground facilities in the area to determine the location of those facilities, and thereby excavate in a safe manner and lessen the possibility of unnecessary damage.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Thomas Hart violated the Dig-Safe Law when he failed to tender proper notification while excavating on November 11, 1993 at 19 Bullard Street in Dedham; and it is

ORDERED: That Thomas Hart, being a violator of the Dig-Safe Law, shall pay a civil penalty of \$200 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,

Kenneth Gordon, Chairman

Barbara Kates-Garnick, Commissioner

Mary Clark-Webster, Commissioner